

**SCOTTSDALE BOARD OF ADJUSTMENT
KIVA - CITY HALL
3939 North DRINKWATER BOULEVARD
OCTOBER 8, 2003
6:00 PM
APPROVED MINUTES**

PRESENT: James Vail, Chair
Terry Kuhstoss, Vice Chair
Carol Perica, Board Member
Norman Sands, Board Member
Neal Waldman, Board Member
Laurel Walsh, Board Member

STAFF: Pat Boomsma
Kroy Ekblaw
Randy Grant
Kurt Jones
Jayna Shewak

CALL TO ORDER

The regular meeting of the Scottsdale Board of Adjustment was called to order by CHAIR VAIL at 6:07 P.M.

ROLL CALL

A formal roll call confirmed members present as stated above.

MINUTES APPROVAL

1. September 3, 2003

CHAIR VAIL: For the record, Commissioner Goralski did call in that she was ill and unable to attend tonight. In addition to the Board Members, we have with us tonight from the City of Scottsdale staff members Kurt Jones, Randy Grant, Kroy Ekblaw, Pat Boomsma, and Jayna Shewak. I will now entertain a motion to approve the minutes from our meeting of September 3, 2003.

VICE CHAIR KUHSTOSS: I move to approve the minutes from the September 3, 2003 meeting.

COMMISSIONER PERICA: I second the motion.

CHAIR VAIL: Are there any corrections, additions, or deletions? I have just a couple. One is not terribly important. Page 12, third paragraph down, misspelling on the Chairman's name. And on the very last page one of much greater import. The next to the last paragraph states the vote. The motion passed by a vote of five (5) to two (2) with Chair Vail and Commissioner Waldman dissenting. It should also read that Commissioner Sands dissented and the vote was four (4) to three (3), not five to two. Are there any others corrections, additions, or deletions to the minutes? No. **If not they stand approved as amended.**

THE MOTION PASSED UNANIMOUSLY BY A VOTE OF SIX (6) TO ZERO (0).

REGULAR AGENDA

2. 7-BA-2003 (Zoning Interpretation Appeal) request by City of Scottsdale, applicant, appealing the Zoning Administrator's interpretation responding to a June 4, 2003 letter requesting an interpretation on the property located at 8755 E Dixileta Drive zoned Single Family Residential, Environmentally Sensitive Lands, Foothills Overlay District (R1-190 ESL/FO). Staff/Applicant Contact is Jayna Shewak, 480-312-7059.

- a. Determine Board's jurisdiction over issues raised in letter dated June 4, 2003.
- b. Determine the merits of the issues over which the Board has jurisdiction.

CHAIR VAIL: The first item on tonight's regular agenda is Case Number 7-BA-2003, an appeal of the Zoning Administrators interpretation responding to a June 4, 2003 letter requesting an interpretation regarding property located at 8755 E Dixileta Drive zoned Single Family Residential, Environmentally Sensitive Lands, Foothills Overlay District (R1-190 ESLO).

We are going to divide this into two parts: we will call Part A to determine the Board's jurisdiction over the issues raised in the letter of June 4, 2003, and Part B, should we approve Part A, would then be to determine the merits of the issues over which the Board has jurisdiction. It has been communicated to staff, and staff in turn to the attorneys that the chairman has elected to put in place the following guidelines for tonight's meeting, which I have somewhat modified.

After hearing discussion from our City Attorney during the Study Session, I have decided to extend the allotted time for presentation to ten (10) minutes for the Part A item, and twenty (20) minutes for Part B. This will apply to the attorneys speaking in favor or opposition, as well as the city staff. So you will have a total of 30 minutes. Ten and twenty. The opportunity for each member of the public to speak will remain at three minutes, and I will not permit any trading or granting of anyone's three minutes to an attorney or to any other person. Each person wishing to speak, for or against the case before us, will fill out and turn in a comment card before we reach the portion of the meeting reserved for public comment.

Again, there will be no handing off of minutes, such as a husband giving his three minutes to his wife, so that she might have six minutes to speak. And I further ask that you limit your comments to matters directly relating to the determinations before us this evening. And just a personal comment here, if I might. I am aware that virtually every case Boards of our type hear can stir an emotional response. Please keep in mind that all of us sitting before you tonight are cognizant of this fact. We are also aware of the importance of each and every decision we make, and we never take them lightly. The granting of a variance or the restriction of property rights is a very serious matter and we will, as in every case we hear, dedicate ourselves to act fairly and justly.

And I would therefore ask that everyone present tonight would also recognize the need to remain focused on the issues and respond to all testimony with the civility and dignity that such matters demand. I would also ask as a matter of civility and dignity that we don't have any cell phones or pagers on during the presentation. And I will ask that everyone present, city staff,

attorneys, public wishing to speak, even if you think there's a possibility you might speak, I will ask that everyone be sworn in.

Will everyone who is going to speak please raise their right hand. Do you solemnly swear that the testimony you may give regarding this case this evening is true and correct to the best of your knowledge and belief? If so, please say "I do". Thank you.

The meeting procedure is also slightly different because of the unusual nature of hearing Parts A and Part B. But the matter before us is essentially the same, an appeal of the Zoning Administrator's decision, requirement or interpretation. The Board of Adjustment will overturn the Zoning Administrator's decision only if four Board Members vote affirmatively to overturn that decision. The applicant and the public may speak after city staff presents the case. When I ask you to come forward to present your case, either in favor of or in opposition to the Zoning Administrator's decision, I ask you to limit your comments directly related to that decision. In this matter, the Board's authority is limited, and the Board acts as a panel of judges deciding whether the Zoning Administrator's decision is supported by the facts and the law.

The public hearing on the agenda item will proceed as follows. Staff will make the first presentation. The Board will then ask questions of the staff. The attorney representing the landowner will then make a presentation, followed by questions from the Board. Then the attorney representing the opposition will then make a presentation, followed by questions from the Board. I will then open the matter for public testimony. Persons in opposition, or support may come forward to speak. I remind you to be sure to fill out a comment card, if you do wish to speak, before we reach that portion of the meeting. And again there is a three-minute time limit. There will be time for rebuttals, and the board again may ask questions of anyone whose has spoken. I will then close testimony. The Board will then discuss the case amongst themselves, and I will call for the motion. The Board will discuss the motion and we will vote. We will begin with the City's presentation.

MR. JONES: Ms. Shewak will present the basic facts of this case for 7-BA-2003. And then Pat Boomsma will follow with a discussion of that item of jurisdiction.

JAYNA SHEWAK: Good evening, Members of the Board of Adjustment. My name is Jayna Shewak with the planning and development services department in the City of Scottsdale. Case 7-BA-2003, which is before you this evening, is a property located at 8755 East Dixileta.

(Shows the general context of the area on overhead)

The zoning is R1-190, surrounding the property, and then R-170 to the north. All of this is in the ESLO district and also the foothills overlay zoning district. Mr. Chairman, after the points of jurisdiction are considered and decided upon, staff will give an in-depth presentation on the merits and matters of this case. However, let me give you a basic overview of what the current site conditions are and a general timeframe under which they were constructed. This is the site. The track in question located clearly on the aerial here. The main residence of the home on this property was built in approximately 2000. Started construction in 2000. The wall was built in the spring of 1998, and the track followed soon thereafter.

That is a basic overview of the issues surrounding the actual physical context of the property. Are there any questions?

VICE-CHAIR KUHSTOSS: Where's the helicopter pad?

MS. SHEWAK: Chair Vail and Vice Chair Kuhstoss, Staff was unclear exactly where the helicopter has landed. That's probably something that the applicant could address for you. What we have come to understand is that it could possibly be in this location. Ms. Lagarde has indicated that this is a pull through drive through the house. This is a garage. Mr. Constantine does have trailers that he has used that for but the helicopter has landed on that area in the past.

COMMISSIONER PERICA: The house was built in 2000. As I understand it, it is not complete. Is that correct?

MS. SHEWAK: Chair Vail, Commissioner Perica, that is correct. It is under construction as we speak.

CHAIR VAIL: I would ask our counsel to come forward.

MS. BOOMSMA: Chairman Vail, Board Members, I am Pat Boomsma, a Senior Assistant City Attorney with the City of Scottsdale, and I am here to give the position of the Zoning Administrator on the issue of the jurisdiction of the Board. I don't think there's any debate amongst the parties as to the basic concept that this Board is a statutorily created Board and your

jurisdiction is defined by state statute, as implemented by City Ordinances. The Board of Adjustment is created under the Zoning Enabling Act in Title Nine of the Arizona Revised Statutes, and there are specific jurisdictional requirements that talk about variances and appeals from decisions of the Zoning Administrator.

So it is very important for you to understand the role of the Zoning Administrator, and the difference between Kroy Ekblaw acting as the Zoning Administrator and Kroy Ekblaw acting as the General Manager of the Planning and Development Services Department. He serves a multitude of roles in that position, one of which is the Zoning Administrator. The Scottsdale Zoning Ordinance also includes provisions implementing this and the specific one that is applicable today is about Zoning Administrator interpretations, and is Section 1.202 of the of the Zoning Ordinance. Sub Section A of that Ordinance talks about "the provisions of this Ordinance shall be interpreted and applied by the Zoning Administrator. Any request for an Ordinance interpretation or decision shall be made in writing" and then the time period. Then this phrase: "provided that no building permits have issued for the subject development." In Sub Section D, there's also a provision about the Zoning Administrator's interpretive powers and the last sentence of Sub Section D is "the Zoning Administrator shall interpret uses within each district." Those are in different Sections of Section 1.202, and that's pretty much the basis of my jurisdictional argument. That once the building permit is issued, the Zoning Administrator cannot make interpretations as to issues such as setbacks or other issues that are related essentially to development standards. It doesn't say that.

But uses can change twenty years after a structure is built. The building permit may be issued and it's used for a perfectly valid purpose for 20 years, then someone comes in with a debatable use, whether its an accessory use, or whether it's an analogous use as discussed in some of the papers and the Zoning Administrator needs the ability to interpret and address those uses at that time. So we think that both from an Ordinance standpoint and from a logical standpoint, the ability to interpret use extends beyond the time when a building permit is issued. And that's pretty much the foundation of our argument in its simplest terms. I went into greater length in my memo to you. If you would like for me to talk about it further.

But then, the second point is the issue of Kroy Ekblaw as the general manager of the development services department, which also makes him supervisor of the building permit or building official department, so a lot of the issues that were addressed in Mr. Heitel's June 4th letter go to those issues. And so Mr. Ekblaw divided his response to the June 4th letter into three

separate letters, one of which, the first, talked about process. The second of which talked about use, which we believe, is what is appealable to this Board.

And third, is more related issues and in an attempt to provide good customer service, Mr. Ekblaw addressed all of these issues raised in the June 4th letter, but specifically noted that the interpretive part of his letter was the use issue, and in simplest terms, that is the City's position. If you have any questions, I would be glad to address them.

CHAIR VAIL: I would like to call on the attorney for Mr. Constantine.

LYNNE LAGARDE: Mr. Chairman and Board Members, for the record, Lynne Lagarde, 3101 North Central Avenue, Phoenix, Arizona. We agree with City Attorney Boomsma on two fundamental issues of law. First, that the only issues before the Board are the use issue in the July 22nd letter. That is an issue before you because it involves an interpretation of the Zoning Ordinance. Under the law, the Board has no jurisdiction over the multitude of other matters that were raised in Mr. Heitel's letter because they do not involve interpretations of the Zoning Ordinance. The courts have been quite clear on this. The Board of Adjustment has no powers except those granted in the statutes and the Ordinances implementing them. And you must act in accordance with the law, or you are without jurisdiction, and actually your actions are meaningless and of no effect.

The Zoning Ordinance states, and once again, I want to be very clear about it. Ms. Boomsma showed us this Ordinance provision, and I have highlighted what I believe to be the determinative language on jurisdiction. "The Zoning Administrator can make an interpretation or other decision, provided no building permits have been issued on the subject development. There is no additional language, as was stated in the city attorney's memo. And I apologize that you will see my comments, highlights and asterisks here, but I only had one copy. The Zoning Ordinance does not go on to say; "except that the Zoning Administrator may continue to make use interpretations after that time." And there's a site to the provision. It doesn't say that. There's no exception language there. And because there's no exception language there, there's no reference to a legislative history that would support this bare statement in the memo that that's the language that should be added, and it violates accepted principles of statutory construction.

And that's why we believe this is determinative in this case. That language simply cannot be added. Even the courts cannot add language to try to construe what an interpretation means. The bottom case, in construing the meaning of an Ordinance, a court will not insert words of

limitation of its own invention. This is a case regarding adult uses, and the court said, it maybe reasonable that that's the language that some people thought this meant, but the language isn't there and we can't add it. Particularly when as in this case, it would contradict the very meaning of the language that we're focused on.

"A zoning law must be given effect according to its plain and obvious meaning and an unambiguous statute should be interpreted to mean what it plainly states." I've also cited to this Board, Kubby v Hammond, and you will hear it from me over and over again. Zoning laws are in derogation of common law property rights. If there's any ambiguity, they are to be construed in favor of the property owner. In this case, strictly construed, once a building permit has been issued, there is no interpretation. That added language would render that provision meaningless.

The city has other ways of enforcing if there's a change in use. And by the way, there's been no change in use. It's Mr. Constantine's home. These accessory uses were always planned, the City knew about them. But if there's a change in use twenty years later, as Ms. Boomsma indicated, code enforcement enforces violations of the Zoning Ordinance. If I operate a business in my home, the City doesn't come to you for enforcement. I'm cited; I'm dragged into court. I'm fined and I can even be put into jail. That's how the city enforces a change of use after a building permit has been issued, not by an after-the- fact interpretation. Once the city issues a building permit, they are saying: this building complies with the Ordinance, and its use complies with the Ordinance.

There's no certainty if a year later the city can come and say, " Well wait a minute we don't think that use is really allowed under our Ordinance. There would be no certainty when a building permit was issued. That added language renders that meaningless. The whole intent of this Ordinance was to prevent interpretations of decisions after a building permit was issued.

In 1998, and I just remembered this this weekend, I had personal experience with a case construing this exactly and applying this exact provision. A client of mine, Mr. Lee Mashman, who I have asked to come and tell you about this tonight and he is here, prepared, and asking to be able to speak to this issue. A neighbor built a large warehouse sized structure right next to his backyard, with double fold doors. He'll show you all of the pictures. He came to the City and said this is restoring helicopters and other large items. I don't think this is an accessory use under your Ordinance. We were told by the City once a building permit is issued there is no interpretation. The City would not even accept the application, which we tried to file to appeal that decision to the Board. They wouldn't even accept our application. They simply said, "The building permit has been issued. End of story. "

That's the way this provision was intended to be interpreted, and the City cannot interpret it in 1998 to say no interpretation and change the rules tonight and say "Well what it really meant is, except as it related to use." It was the exact same issue; use after the building permit had been issued. In this case it's particularly important. The permit was issued for the principal use, and the principle use... this property was selected so that Mr. Constantine could enjoy precisely the accessory uses that we are talking about tonight. He chose that forty-acre site because he could enjoy those uses without disturbing anyone.

So again, to say except as to use, really renders this provision meaningless. And if the Board accepts jurisdiction in this matter, and another neighbor complains, for example, that his neighbor's tool shed is inappropriate and has adverse impacts, you should say it's not allowed because he's using a loud saw or a loud drill. That is not a subject for this Board. That's a code violation. It's the same thing with equestrian uses. The neighbors complain about flies and odor. Those are adverse impacts. Those shouldn't be allowed as an accessory use. It's inappropriate; it's affecting us. Those are nuisance or code violations. They are not use interpretation issues and if you accept jurisdiction, you would be accepting jurisdiction in all cases of neighborhood complaints relative to problems with use.

We do not believe that's within the purview of this Board. Zoning violation matters are matters for code enforcement. We also agree with the City Attorney and Vice Chair Kuhstoss that all of the other matters in Mr. Heitel's letter are not involving interpretations of the Zoning Ordinance and therefore this Board has no jurisdiction to discuss any of them. And on that basis we ask you to first, decline jurisdiction in this case on the basis of the fact that a building permit has been issued and that has been the past application of this Ordinance by the City and, secondly, to decline jurisdiction on all issues that are not matters of Zoning Ordinance interpretation. Thank you.

CHAIR VAIL: Thank you Ms. Lagarde. Does the Board have questions? None at this time.

LARRY LAZARUS: My office is at One Arizona Center, Phoenix, Arizona. I represent Desert Foothills Neighborhood, Linda Dean, James Heitel, and Gordon Zuckerman. I do want to talk first about jurisdiction as it relates to accessory uses. And although Lynne indicated...and I wasn't sure if she was protesting jurisdiction as it related to the interpretation, but I wasn't sure

about the presentation, so I will go ahead and talk about that. And I will talk about the jurisdiction in relationship to the building permit issues.

First of all, I want to thank you for taking the time in reviewing the voluminous material. I know this doesn't happen all the time. You don't get this kind of information regularly. I know you are on a volunteer basis and so I appreciate it, as well as my clients appreciate that. Let me go first to Section 1.202 of the Scottsdale Zoning Ordinance. It addresses interpretations and decisions. Paragraph A of that Section states the following: "The provisions of this Ordinance shall be interpreted and applied by the Zoning Administrator. Any request for a zoning interpretation or decision must be made in writing to the Zoning Administrator and the Zoning Administrator shall respond in writing within 45 days of the date of the written request, provided no building permits have been issued on the subject development."

The jurisdictional issue that Ms. Lagarde argues is that once a building permit has been issued for a subject development, that Ordinance says that an interpretation cannot be done. Ms. Lagarde has failed to realize that the building permit issued for Mr. Constantine's property is for a single-family residential unit. The building permit, current and past for a single-family residential development does not include a racetrack or a helipad. There is no interpretation that we have asked for related to the use of the single-family residential development. The only interpretation is an interpretation related to this racetrack and to the helipad, for which no building permit has been issued. In fact, Kroy Ekblaw clearly states that the racetrack and helipad are not part of the building permit issued for the single-family home on the Constantine property. It's not part of the permit for the development we are talking about.

In the letter of May 30, 2003 from Mr. Ekblaw to Ms. Lagarde, he wrote, the issuance of a building permit is an approval to complete the construction on the house only, pursuant to the approved plans, and not for any modifications or construction, or other uses of the property. On June 9, he wrote another letter, "to clarify my letter of May 30, our approval of plans is only for the issuance of a building permit to allow the completion of the home. There is no approval for or any site plan changes such as walls, grading, and pathways. There is no approval given or implied that your client has permission to use the property for any other uses, to land a helicopter or utilize a racetrack. The approved site plan shows no indication or labeling of a helicopter landing area or an area...and the area previously utilized as a track is shown as an existing asphalt path. The proposed extension of the building permit is for the completion of the existing structure only, and is not an approval or acceptance of these other uses."

Again on June 19, Mr. Ekblaw sent another letter to Ms. Lagarde and that letter basically reiterated some of the other statements that were made. And I am not going to go into that in detail. So the correspondence clearly indicates as do all the permits indicate that the subject for the permit was only the house. And so there has not been a permit issued for a racetrack. There has not been a permit issued for a helistop. Additionally, the interpretation according to the requirements of the Zoning Ordinance was made before the issuance of the building permit, not after. Mr. Heitel, if you take a look at that order of events.

Mr. Heitel's interpretation request was submitted on June 4, 2003. The Zoning Ordinance mandates that the interpretation shall be made within 45 days of the request. On June 17th, Mr. Ekblaw confirmed in a letter that he will meet that 45-day requirement. So, by Ordinance, the requirement for the interpretation was to be done July 21, if you count 45 days in the future. The Zoning Administrator attempted to meet the deadline, but missed it and submitted his report initially July 22nd. But that letter was altered and changed to July 25th. The building permit for the single-family residence was not issued until July 24. The prior one had expired almost two years ago.

So Ms. Lagarde's argument that the interpretation was valid because a building permit was already in place, there was no building permit in place when the Zoning Administrator was by, Ordinance, required to have completed his response to Mr. Heitel. In addition the staff, I believe rightly, notes, "An accessory use, which could occur years later after a building permit had been issued, and in fact, occupancy had occurred, is not tied into that building permit. Changes may be made, and you are entitled to an interpretation. Therefore an accessory use interpretation is a proper subject for the Zoning Administrator in this particular case. Lastly, something Ms. Lagarde didn't bring up, but did in her information that she submitted to you, was this concept that, you don't need any control, because the Federal Aviation Administration controls all helicopter taking off and landing. That's just not true. The FAA controls when the aircraft is in the air. The City controls the landing and taking off of helicopters under its regulatory powers, under its health, safety, and welfare for land use issues, and I could go into more detail if you have questions on that. So we believe that you do have jurisdiction as it relates to the interpretation request.

Let me talk to you about one that I disagree with staff on, and that is whether or not we have jurisdiction on the building permit issues. The Board of Adjustment Rules, which were just placed before you, before we began this meeting in your Study Session, 401 says that you can hear appeals from administrative decisions. Staff states that the Board of Adjustment lacks jurisdiction because the building permit has been issued, and the interpretation is untimely under

1.202, and that the Zoning Administrator does not have authority over building permits. First, they argue that the building permit has been issued, and that the interpretation is therefore untimely.

Staff, in their report, notes that the Constantine building permit expired in 2001. There was no building permit in place when Mr. Heitel requested the interpretations on June 4, 2003. The Ordinance mandates that the interpretation be done within 45 days. July 21, 2003, the building permit was not issued again until July 24, 2003. Again, Mr. Ekblaw was not only late in his interpretation, but then he altered the document and changed it until after the building permit had been issued. The proper date for the Zoning Administrator's response, according to the Ordinance, was before the building permit was to be issued, therefore the interpretation is not untimely and it was done before the building permit was issued, before it was supposed to have been issued according to the Ordinance.

Secondly, the Zoning Administrator, we believe, does have the authority, contrary to staff's position, to control the authorization of the building permit. The Board of Adjustment, under State statute, 9-462.06G states that the Board of Adjustment shall hear and decide appeals in which it is alleged that there is an error in the order, requirement, or decision made by the Zoning Administrator in the enforcement of the Zoning Ordinance. Additionally the Zoning Administrator has authority in controlling a building permit according to the Scottsdale Zoning Ordinance. Section 1.1101 states that it is unlawful to construct a building or structure without first filing with the Zoning Administrator an application in writing and obtaining a formal permit. Mr. Ekblaw exercised that authority on June 19th, when he sent a letter to Ms. Lagarde stating, "We will be releasing a building permit for Mr. Constantine's home." In Ordinance Sections 1.01 and 1.05, it is stated that the Board of Adjustment shall also hear appeals from the Zoning Administrator's interpretation of the Zoning Ordinance or other decisions.

This was a decision of the Zoning Administrator, according to that Ordinance, and therefore appealable to the Board. To construe that Section 1.1101 does not authorize the Zoning Administrator to approve the issuance of a building permit, would be to render the filing of an application literally a useless act. The only purpose for the filing of an application is to allow the Zoning Administrator to allow a building permit to be issued. There must be some purpose for the review of the Zoning Administrator. This is further evidenced by the fact that if the application contains false statements or misrepresentations, the Zoning Administrator may revoke the building permit. It doesn't make sense if he can revoke the permit, but doesn't have any control over the issuance.

So we believe that we have both jurisdiction in the interpretation as well as the action taken by the Zoning Administrator, according to these statutes of your Ordinance.

CHAIR VAIL: Does the Board have any questions of Mr. Lazarus? Hearing none, coming to the portion of the meeting for public comment, let's try to be a little creative. It's the feeling of the Chair that public comment to be made tonight is more with the issue of the site and not the issue of whether or not the Board should hear the case. I will ask if anyone is here specifically to speak on Part A. Part A is strictly to determine the Board's jurisdiction over issues raised in the letter of June 4.

LEE MASHBURN: Mr. Chairman, Members of the Board, my name is Lee Mashburn. I reside at 10040 Shangri-La in north Scottsdale. This is an area of homes ranging in value from \$500,000 to \$2,500,000. The last home on my street to sell, sold for \$2,500,000. Ms. Lagarde asked me to come and provide some perspective on the issue of jurisdiction tonight. I was involved in a very similar to this, and it was not a positive one. Two years ago my neighbor built a warehouse, adjacent to my home, five feet off the property line. The warehouse was built under the accessory use clause in the current Zoning Ordinance for the city of Scottsdale. My neighbor is a helicopter pilot and stores helicopters, dirt bikes, and other recreational vehicles and works on them out of his warehouse. The warehouse has a heavy-duty compressor, adjacent to it, constantly coming on and off, and is 16 feet tall, 110 feet long and again, 5 feet off the property line. And it has a very negative effect, in my opinion, on the property value of the neighborhood and on my property. And I will show you a few pictures to give you some perspective.

(Shows photographs.)

When I hired Ms. Lagarde to deal with this issue for me, she indicated that I would have to apply to the Board of Adjustment for an appeal, because the building permit had already been issued on this facility. I did so because this particular building devalued my property in my opinion. The City of Scottsdale refused to accept the application to the Board of Adjustment on whether this was even an allowed use on the grounds that the building permit had already been issued and, under the Zoning Ordinance, that neither the Zoning Administrator nor the Board of Adjustment had any jurisdiction. Because she represented me in this case and because it was such a sore point with me, when she described this case, I volunteered to come and speak to you

about it. Because if you apply the Ordinance one way for one person, you need to apply it the same way to everybody else. There ought to be consistency in the way the City interprets its Ordinances and applies them. That's all I have to say.

CHAIR VAIL: Would Ms. Boomsma have any comments?

MS. BOOMSMA: No. I think my memo stands for itself, and I don't... I wasn't here when Mr. Mashburn's case came forward, so I don't have any independent knowledge of the facts on that.

CHAIR VAIL: Ms. Lagarde, do you have any rebuttal on any of the comments that have been made?

MS. LAGARDE: Yes. Thank you Chair Vail and Members of the Board. The building permit for the Constantine residence was issued in 1998. And that's when initial construction began. It was extended in 1998, and reissued in 2000, when Mr. Constantine changed architects and changed the plan. So since 1998 there has been a building permit issued on the property. Case law, which I have cited in my memo, states the expiration of a building permit does not take away vested rights. In this case the subject development includes the accessory uses.

We have acknowledged you don't need a building permit. It's part of the building permit for the house when you put in a driveway turn around, which is the area where Mr. Constantine has occasionally landed his helicopter. It's part of the building permit for the house. Accessory uses are the same way. The go-cart track did not require a building permit. It was part of the allowed construction of the building of the home. It was why he chose this property. So we do not agree that there is jurisdiction in this matter. The building permit was issued in 1998.

Additionally, the Section cited by Mr. Lazarus in the Zoning Ordinances, Section 1.101, that's a Section that says simply, if you want to build something in the City of Scottsdale, you have to file plans and you have to receive a permit. It does not authorize the Zoning Administrator to issue that permit. As the City Attorney correctly pointed out, that is the building code official, he is the one charged with issuing the building permit. If your plans comply with all Ordinances and City regulations, the City cannot arbitrarily not give you a building permit.

There is no appealable decision by the Zoning Administrator on the issuance of a building permit. Therefore all the other issues that have been raised are also outside of your jurisdiction. Just because the Zoning Administrator can revoke a permit, if there has been a misrepresentation, that doesn't authorize him to be the city official to issue the permit. That is the building code official. None of the Sections cited by Mr. Lazarus gives the Zoning Administrator the ability to make an arbitrary decision that: the plans meet the code, but oh, by the way, you can't get your permit, because the Zoning Administrator says you can't. That's not how the law works. That's an administrative decision under the Code by the building official.

Therefore, again, those provisions do not give you a decision by the Zoning Administrator that is subject to interpretation under the Zoning Ordinance.

CHAIR VAIL: Thank you very much. Mr. Lazarus, would you like to directly address the rebuttal?

MR. LAZARUS: Thank you Mr. Chair and Members of the Board. Very briefly, again, the building permit for the subject development was for a house. As a matter of fact, I don't know how one determines that a driveway turnaround as specified, is a heliport, and how an indication on your plans of a path way becomes a racetrack. This was either done covertly or unintentionally, but it certainly was not disclosure of what was going to occur, and that's why the building permit was only issued for the building and accessory uses.

The staff has indicated accessory uses can be determined later on down the road, not for the building, but for the uses themselves. We disagree that the Zoning Administrator does not have authorization. I think the Ordinance itself indicates that he does have authorization, and that we are to submit that information to him. Everyone is to submit that information to him and in Section 1.101, I think it's clear that the Zoning Administrator receives an application in writing, obtains a formal building permit, and has some authority in order to authorize the issuance of it, whether or not the building department is designated that authority to issue it, it's still under, according to these Ordinances, under the zoning administrator's purview to receive and to authorize the movement of that permit along. Thank you.

CHAIR VAIL: I will close testimony on Part A, and ask for Board discussion. I believe it is Mr. Waldman's turn to begin, if you so choose.

COMMISSIONER WALDMAN: For now I will pass... The Board has heard recently a similar case regarding accessory uses, and I believe it is in our purview to hear this case, and I shall leave it at that.

COMMISSIONER WALSH: While I am sympathetic to Mr. Mashburn's situation, and I know him to be sophisticated in real estate matters, I don't know that that point is relevant to this situation and how the City might respond in one case as opposed to another. I believe that I side with the City's argument that the accessory use interpretation by our Zoning Administrator is appropriate for review by this Board.

CHAIR VAIL: Thank you, Commissioner Walsh, and I will speak in turn. I concur with Commissioner Walsh; I don't think that there have been sufficient questions raised as to why we should not hear the balance of the case. That's my only comment. Vice Chair Kuhstoss?

VICE CHAIR KUHSTOSS: I'm in agreement with the other Members of the Board, and see no valid argument against us having jurisdiction. I think that the accessory use and the problems going on at this property need to be addressed, and I think this is the proper forum now that there is something appealable to the Board.

COMMISSIONER SANDS: I agree with what everybody has said so far on the Board that we can hear this matter based on all the law as set forth by the parties involved and by common sense also.

COMMISSIONER PERICA: I agree with the rest of the Board. I think the issue here is accessory use, and that's under our jurisdiction.

CHAIR VAIL: Thank you. I will entertain a motion.

COMMISSIONER WALSH: I have an additional comment. I wonder if before we make a motion, we should clarify whether we are only addressing the issue on accessory uses versus some of the other points Mr. Lazarus brought forward on time, efficacy of building permit and other issues presented in the letter, and hence **I would be happy to make a motion that we only**

address the accessory use interpretation as stated in request number 7-BA-2003, and that we limit our review to the accessory issue.

COMMISSIONER PERICA: I would second that motion.

CHAIR VAIL: We have a move and a second to approve that the Board's jurisdiction is clear over the issues raised in the letter of June 4, 2003. Is that correct?

COMMISSIONER WALSH: Yes.

MS. BOOMSMA: The June 4th letter is the original letter containing the nine questions. There were three responses by Mr. Ekblaw. The only one addressing accessory use is the July 25, 2003 letter. It was originally dated July 22nd in error and re-dated to July 25th, so if you choose to find jurisdiction over the entire June 4th letter, then it would be all the issues. If you choose to limit it to accessory use issues, it would be limited to the response contained in the July 25th letter.

CHAIR VAIL: Is that your pleasure?

COMMISSIONER WALSH: Would you suggest we restate the motion to clarify that point, or just to add that we wish to only address the matter as presented and interpret the Zoning Administrator's decisions in his letter of July 25?

MS. BOOMSMA: I think if that's your motion, that's sufficient. It would limit to the July 25, 2003 letter specifically addressing the accessory use.

COMMISSIONER PERICA: I will second the motion.

CHAIR VAIL: Any further discussion?

COMMISSIONER WALSH: I just wanted to state that there are so many permit date issues and such presented. I as an individual and layman in this technical area wouldn't presume to try to interpret the other matters and the timing of them and the appropriate application. And I

think the heart the matter and critical issue and concern to the public is that of the accessory use issue, and I think we serve our city and citizens better just to keep ourselves limited to that issue.

CHAIR VAIL: Yes, and I think that is the heart of the issue. Any further discussion by the board?

THE MOTION PASSED UNANIMOUSLY BY A VOTE OF SIX (6) TO ZERO (0).

CHAIR VAIL: The motion passes unanimously. We are saying that we do have jurisdiction over the issues raised in the response to accessory use. We will proceed with Part B.

COMMISSIONER WALSH: In case the representatives and individuals may need to address things, and just to maybe give us quick break, could I ask that you could give us a five minute break, and that might carry us through most of the bulk of the meeting.

(A recess was taken between 7:05 pm and 7:10 pm)

CHAIR VAIL: We will hear presentations on Part B of the proposal to determine the merits of the issues over which the Board has decided we have jurisdiction. Making the presentation for the City of Scottsdale, Jayna Shewak.

JAYNA SHEWAK: Thank you Chair Vail. Once again without reviewing the zoning, etc, I will go straight to the issues. I would like to begin to summarize some of the code enforcement activity that has taken place on this site recently. Staff has cited the owner in the spring of this year for the incomplete structure on the house and in addition to that there was a notice of that compliance sent to them in January. That particular case was dismissed because the owner pulled the building permit, and is now continuing construction on the home. So there is now no current code enforcement activity on the property at this time. As of this writing of the staff report, there has been a significant amount of public comment on this particular project. We have received over 60 e-mails. Of those, most were opposed. However, there is some support for the continued use of these accessories on this property. Let's take a look back in time at the genesis of this particular piece of property.

The property received approval for permits for a single family home and a perimeter wall back in 1998. The site plan that staff reviewed at the time did not show any type of a track improvement, as is now constructed on the site. As is traditional, when a property is built and under construction, the owner may wish to secure his site. Again because the City had issued permits for both a home and wall at the same time the wall was allowed to be constructed, and it came first. Shortly thereafter, there was some usage of the racetrack and the construction of the home was delayed. The applicant had notified the City that they were working on revisions to the home. By January of 2000, a revised home plan did come in and we reviewed it, approved it, and issued permits for the present day structure located here and also the turn-around area that is also used as the helicopter landing area.

Between February and September of 2001, construction activity began to decline on the property and by September 2001, in a six-month period, there had been no inspections and therefore the permit was declared to be expired as of September, 2001. From the period of 1998 in the spring or the summer thereof when the track was in existence, up until January of this year, the track and helicopter-landing areas had been used. Staff had issued letters to the owner stating that the primary use had to exist on the site prior to the accessory uses to also be able to exist.

This was repeated to the owner of the property, Mr. Constantine, in several correspondences from Mr. Ekblaw in the spring of this year as well. And to our knowledge we don't believe there has been any further use of the racetrack except for the site demonstration that took place on the 27th of September, which the Board attended. On June 4th of this year, a citizen residing near the property, Mr. James Heitel, sent a letter to Mr. Ekblaw requesting, among other things, an interpretation of whether or not the helicopter landing areas and racetrack were accessory uses to the property.

On July 25th, Mr. Ekblaw, acting as the Zoning Administrator, responded to Mr. Heitel's request and stated, in summary, that the asphalt track and paved area for the helicopter landing are indeed considered to be accessory uses to the property. I will give you the Ordinance definition of accessory use. "An accessory use shall mean a use customarily incidental, related, appropriate, clearly subordinate to the main use of the lot or building, which accessory use does not alter the principal use of the subject lot or building, or adversely impact or affect other properties in the district." In this particular situation, this is not the typical Board of Adjustment request, in which you make four findings.

Once again, tonight's determination that jurisdiction is based on whether or not these two uses are indeed accessory to the property is the main point of discussion. The traditional four facts that must be found to be true in a traditional variance do not apply. At this point this concludes staff's presentation of the history, and where we are presently on this project. I would happy to answer questions, acting on behalf of the City as the appellant to the Zoning Administrator's letter.

VICE CHAIR KUHSTOSS: When we toured on July 27th, I noticed a lot of dead native trees that looked like they were supposed to have been transplanted. Is that correct?

MS. SHEWAK: Yes, that is correct, Chair Vail and Vice Chair Kuhstoss. There were some native plants that have died as a result of salvage. We have received confirmation from the property owner that they will remedy that situation prior to the certificate of occupancy being issued. So they are aware of it, and we are aware of it.

VICE CHAIR KUHSTOSS: And also I wonder about – this is this an ESLO area? Is that correct?

MS. SHEWAK: That's correct.

VICE CHAIR VAIL: And what does the paving of the racetrack do to the natural washes that go through this property? I understand that there is a fairly major wash that goes through the property.

MS. SHEWAK: Mr. Chair and Vice Chair Kuhstoss, the property received clearance through the Army Corps of Engineers through their 404 jurisdictional process. The process started in 1997 and 1998, and the court made a determination that this was a jurisdictional watercourse. They did allow the crossing of the walls, and did approve those. The actual drainage easement on the property follows this area (demonstrates on map), and so there is no encroachment into the flow path of what is called the Rawhide Wash. And the drainage staff of the City did review that, as did the Army Corps of Engineers.

COMMISSIONER PERICA: You mentioned that the wall was the first thing to go up in 1998, I believe or 1999, and the racetrack was the second. Was the City aware of the racetrack?

MS. SHEWAK: Chair Vail and Board Member Perica: We became aware of the racetrack towards the end of the summer of 1998. The wall went first, the racetrack second.

COMMISSIONER WALSH: I think this is the probably the first private home of 28 acres, originally 40 acres, that we have encountered, and I am quite used to up to five acres for a residence, but how many, do you have any idea of how many 28-acre individual home sites that we might have in this area or in Scottsdale?

JAYNA SHEWAK: Chair Vail, Board Member Walsh, we haven't done an analysis, so we don't know.

COMMISSIONER WALSH: Can you tell me, in general, how many you have dealt with as a planner?

JAYNA SHEWAK: Chair Vail, Board Member Walsh, I am personally aware of one (1) in this area, a property north of this site at the corner of Westland and Pima, that is a 40-acre parcel with a single family home on it. I have not personally dealt with any other large lot projects such as this one.

COMMISSIONER WALSH: Can you describe to me the accessory uses on this 40-acre parcel?

JAYNA SHEWAK: Chair Vail, Board Member Walsh, there is a railroad track that the owner has, a small model railroad.

COMMISSIONER PERICA: Can you just briefly elaborate on how small this railroad track is?

JAYNA SHEWAK: Chair Vail, Board Member Perica, the actual railroad track (shows on the map) skirts the perimeter of the home, and meanders through the desert, and shows up on an aerial photograph.

COMMISSIONER WALDMAN: Are you aware at all if this racetrack has ever been used for anything but personal use. Has it always been a non-commercial use? Any charges or anything used as a test track, or anything like that.

MS. SHEWAK: I am not personally involved nor am I aware of any commercial use. It is an allegation. However, staff is unaware of exactly professionally or not – how it's been used.

MS. LAGARDE: Mr. Ekblaw's interpretation that the go-cart and helicopter uses are allowed accessory uses under the Zoning Ordinance is supported by well-accepted principles of zoning law, and are consistent with the City's application of its Zoning Ordinance relative to accessory uses and therefore should be upheld by this Board. Mr. Ekblaw correctly states that accessory uses customarily incidental, that is secondary to the main residential use of the house are allowed under the code, and despite unproven allegations to the contrary, Mr. Constantine's sporadic use of the racetrack – it has not been in continuous use over four years – and his occasional, actually very rare helicopter landings are clearly a secondary use of the property.

The main use of the property, the everyday use of the property that will be the home. And by the way, once the building permit was issued we were told we could use the go-cart track. And Mr. Constantine did not use it after the permit expired. Neither use alters the main use of the property, and if there are adverse impacts, again that is a subject for zoning enforcement. Mr. Ekblaw also points out correctly that there are uses commonly found, accessory uses that are allowed in Scottsdale, but also, uses not as common have been allowed by the City under this Ordinance. And some of those uses, you've already heard about, one of which is the train track, which we do have aerials of and you can see meandering around the property, as Ms. Shewak described. And there's only one in your City like this. They are unlikely to proliferate; takes up a lot of land, and is very unique, but it is loud.

Additionally, uses that are allowed as shown in this one (shows photograph) This is a helicopter landing area on a property in Scottsdale, and it's sort of like Mr. Constantine's. It's a driveway turn around and another of these unusual uses is a full baseball diamond. We have a trout pond, an ostrich farm, and various equestrian uses, which are more common, but again all allowed. And the issue is whether the use is secondary, incidental, not whether it usual or unusual or common or not common.

That's the issue that we need to be focused on. Again, well-accepted principles of zoning law support this, Kubby v. Hammond, that we've discussed before. Zoning Ordinances are in

derogation of common law property rights, and if ambiguous or uncertain, will be strictly construed in favor of the property owner and the free use of property. Additionally, the courts should give great weight to the construction of a Zoning Ordinance, by the officials charged with the duty of enforcing it, and here your Zoning Administrator, who is charged with the duty of enforcing it, has told you these accessory uses are allowed. These principles have been reiterated in cases in Arizona quite consistently.

Mr. Ekblaw's interpreted the Ordinance the way the city has always interpreted the accessory use provisions, in favor of the free use of property, and allowing people with even unique, uncommon uses, to have these accessory uses on their property. Now not surprisingly, although this interpretation is supported by general law, it is also supported by specific case law, which has not been cited by Mr. Lazarus. In the Town of Paradise Valley v. Lindberg case, and this is a ham radio tower, the neighbors alleged that that's uncommon. There were not a lot of those in Paradise Valley. It wasn't appropriate. And the court was quite clear that family hobbies, education, and recreation are without question accessory uses, customarily incidental.

The court made it clear that that meant not that they were common, but they were secondary to the main use of the house. The fact that not many people have an amateur radio antenna no more precludes this use, than the fact that not many people have tennis courts, precludes that particular use. The case that Mr. Lazarus did give you was the Redington Ranch case, and in that case, which was not consistent with Lindberg, the Redington Ranch case mistakenly construed what customarily incidental means. It does not mean usual; it means secondary to the main use of the house and, under Redington Ranch, that rationale says: If I had an unusual use that nobody else in my community has, you can't allow it. You have seen the rideable track, a very unusual use, not common in this community, allowed as Mr. Ekblaw told you under the Scottsdale Zoning Ordinance.

If you apply the Redington Ranch rationale, you could not have the trout pond, the baseball diamond, or the ostrich farm because they are not common. Now all of the inappropriate and adverse impact allegations that you are going to hear are actually irrelevant. The Zoning Ordinance can't possibly list every accessory use that someone might think of to use on their property. The Zoning Ordinance would never list a miniature, rideable train track as an accessory use. Nonetheless, it's allowed and the appropriateness or potential adverse impact of an accessory use can't be determined in advance by interpretation until the use actually occurs.

For example, again, the tool shed, it's an appropriate use, but if someone uses it inappropriately, loud drilling, loud saw, loud pounding all hours of the night, that's a zoning

violation under your code relative to accessory uses, and the person could be cited, brought to court, and eventually could be put into jail. Another thing, with intense equestrian horse uses people could complain about that, manure odor, flies, dust control, not adverse impacts that are a nuisance or a violation of the zoning code, and you go to zoning enforcement and cite that use. Neither of the uses, tool shed, the trout pond, any of them, should be precluded in advance because someone might use them inappropriately. And neither can the go-cart track, the go-carts themselves, or the helicopter be precluded because someone could use them inappropriately.

In response to Mr. Waldman's question, the track has never been used for commercial purposes, never a fee charged, never any kind of commercial uses. It's been used by Mr. Constantine and his friends. If the use has adverse impacts, it is an issue for zoning code enforcement as a violation of the code, based on evidence, based on proving a violation, not based on allegations or fears of adverse impacts. And even though these are irrelevant issues, you are going to hear about a lot of these issue, so I want to tell you about the facts. It has been alleged that there has been frequent and recent use of the go-carts and helicopters on a racetrack and a helipad. That is a mischaracterization. I want to show you kind of thing that leads to this kind of mischaracterization.

(Ms. Lagarde holds up a document)

This was a letter that was sent out by the Desert Foothills Neighbors, who Mr. Lazarus represents. It says, "Protect your neighbors, a professional motorized vehicle racetrack and heliport in close proximity to your home." That is not what the Board of Adjustment members saw what they went out there. It is a go-cart track. This implies Indianapolis 500 type racing, and a heliport with regularly scheduled landings.

The letter that went to the neighbors was full of these mischaracterizations and it led to a lot of form letters that you received in opposition to this use. You have the affidavit of the pilot, Exhibit B, which confirmed that since January, at least since January, the helicopter has not been used on the property. Mr. Constantine tells me it was long before that, that the helicopter was not used on the property. The driveway bus turn around, Mr. Constantine used a bus in his touring when he was racing, is where the helicopter has landed. It doesn't even have the big arrows on it like the other helipad that you saw.

The noise and safety problems that you have heard, we have also apprised you of the great lengths Mr. Constantine has gone to modify the go-carts, to contain the sound, and the use

of the Notar helicopter. The very fact that he chose a 40-acre property; it was 40 acres when he bought it, and it will have only one house on it. With this whole area that no one else can use next to Pima Road where the impacts are, not next to his neighbors, he has clearly been respectful of his neighbors and will continue to be. All the claims of noise and safety problems were not corroborated by the three noise tests, which we did on the property, or by any factual evidence.

A three-year-old claim, resurrected recently, of a person injured on a horse. Ms. Dean said to the media that a rider was thrown. Her attorney said "almost" thrown. We have had contradictory allegations here. Mr. Constantine had two of his friends with horses there for the sound demonstration. They didn't move. We also have letters that you've seen from Mr. Critch, letters from neighbors in Siquidados and additionally there have been some letters that have come in after the fact, which I would like to talk to you about, two of which are unsolicited.

The neighbors saw Mr. Williams name in the paper and wrote to him, and said thing like: "I have lived in Siquidados, no harmful adverse effects, personally I have never been disturbed by Mr. Constantine's use of the property, and as I think it's outrageous that the City is trying to control that. And as a result of the media hype I heard about this and find this to be very invasive on the part of the city. Mr. Constantine has the right to use his land freely, and furthermore, I haven't been disturbed and the noise disturbance claims by the others are greatly exaggerated. "

You are also going to hear an allegation that three helicopters, associated with Mr. Constantine landed on his property in March. Those helicopters were there at the scene of a very serious accident at Pima and Dixileta. This was later acknowledged by Linda Dean. I heard it personally in a conversation between Tommy Constantine and Mr. John Aleo, which I will enter into the record, that she knew the very day that it happened those weren't his helicopters, and yet she continues to make these claims. They appeared in even the material submitted by Mr. Lazarus that those three helicopters were associated with Mr. Constantine.

You have heard allegations that there has been four years without the primary use. Again, we had a letter, we had discussions with the city at the time we issued the building permit, and we wrote back to the City to confirm our understanding, and I just want to read you one quote from that letter to John Faramelli, September 17, 1999. "You have confirmed in our discussions subsequent to July 13th letter, that based on your, Kroy Ekblaw and Jeff Fisher's review analysis of the accessory recreational track. Staff has concluded that as long as there is a valid building permit issued for the residence, as the principal use of the property, the use of the recreational track is in compliance." And that point was that we didn't have to have a certificate of occupancy. The staff made that determination and they told me; this is really no different than the railroad

track that we have already allowed. They didn't even see it as an issue. They raised no problem when they were advised, and when it appeared on the 2000 plans, that the racetrack or go-cart track was in existence.

There have been allegations of commercial use of the track and the helicopter. Any of us can invite business colleagues to our homes and entertain them without that becoming a commercial use of our property. This is a private practice track. It has never been used commercially, no fees ever charged, only used by professional driver friends. No sales of the helicopters, no helicopter demonstrations. It has been strictly for his personal use, with his pilot. He is a student pilot. This is no different than Michael Jordan inviting his professional basketball friends to use his basketball court, or maybe his sponsors, Andre Agassi doing the same, or Wayne Gretzky. Somewhere up north, he had an ice rink on his property. Again, this does not make it a commercial use of the property, as you will hear.

And the last claim, which is that the demonstration was staged that some of the Board Members went to. First of all, as we also advised you, this is the northeast practice area, used by all of the airports in this area. It is subject to very very heavy over flights. The same kind of over flight that occurred at the demonstration on September 27th occurred at the demonstration on July 30 when staff was there, we also submitted an exhibit of the increase in flight path tracings after the year 2000 in the area. This is a heavily used general aviation area. Mr. Constantine went out to this property last Saturday. And I will introduce this to the record. He took photos. In half an hour, thirteen motorcycles driving by his property, continuously driving by on Pima Road. What you heard was not unusual, nor was it staged.

These have been false accusations against Mr. Constantine. Again, if Mr. Heitel and the other neighbors can prove that there's a commercial use of the property, all they have to do is go to zoning enforcement. He can be cited for a violation, he can be dragged into court, he can be fined, and he can be enjoined, he can be imprisoned if he is violating the Ordinance. And that is how allegations of commercial use are handled in the City. They've not done this because they know he is not using the track for commercial reasons, but for personal use of the go-carts.

Now to suggest that if you uphold the Zoning Administrator, you are going to open the city up to a proliferation go-cart tracks or helicopter pads is simply unreasonable. The City now allows helicopter-landing areas, as you have seen. There may be a handful in the City. Most people would not want to be in a helicopter, would not want to own one, and it's not their lifestyle choice. They haven't proliferated. They will not proliferate. The railroad track that you saw, the go-cart

track, they all take up a lot of land. No one would do this on a normal sized residential lot. As Commissioner Walsh points out, there are very few of these large properties in the City.

For the Board to overturn the Zoning Administrator would actually set a far worse precedent for the residents of Scottsdale. Because, as I said before, If neighbors can use this Board to get rid of a use that they don't like in their neighborhood or complain about, then they can get rid of any use. They can get rid of the trout pond because it breeds mosquitoes and we have a health issue, West Nile virus, they can get rid of equestrian uses that generate noise, odor, and manure. They could just keep coming to you with every complaint and neither you nor any other citizen of Scottsdale could be assured that you could use your property in the way in which the Ordinance allows if your neighbors complain. Because instead of going to zoning enforcement, and having to prove their allegations in court, they could come to the Board of Adjustment and try to get the accessory use determined to be a use that is not allowed in the City.

We believe that this is a very dangerous precedent. It was never intended by the Ordinance. The Ordinance sets up clear enforcement procedures. And coming to the Board of Adjustment to get rid of uses that neighbors complain about is not one of them. What we have here is neighbors who have exaggerated the impacts, exaggerated their claims, and perhaps disapprove of Mr. Constantine's lifestyle choices. And finally, they have listened to false rumors spread about Mr. Constantine by the Scottsdale Police Department. They are trying to get him to leave the neighborhood, is our belief. For all of these reasons that is why we believe that is why this case is before you tonight, improperly.

That's the level of emotion involved in this case. Other neighbors, and there are lots of letters, and you will hear their testimony, telling us of that there are no problems, no noise impacts, no safety impacts, no property devaluation impact, but we would ask that you not be distracted by all the allegations and counter allegations. The issue is simply, is the Zoning Administrator correct when he says that under the Ordinance the accessory uses of the go-cart track and helicopter landing occasionally are allowed.

One other issue that needs to be distinguished is the issue that the City of Scottsdale turned down an Ordinance amendment to allow helicopters in the R1-190 district by use permit district. That was not to allow occasional helicopter landings as an accessory use. It was to allow, with use permit, a heliport as a principal use in that residential district. That is an entirely different matter. That was frequent use of the helicopter. So what we are asking you is that the very-well reasoned interpretation of the Zoning Administrator is supported by Arizona case law and is supported by the practice of the city and we believe should be upheld by the Board Thank you.

MR. LAZARUS: Mr. Chair and Members of the Board, the issue here is, is the racetrack and helicopter landing pad accessory uses to a single-family residential use? There have been many exceptions about this case. This case is not about construction of a racetrack and a helipad. This case is not about noise. This case is not even about getting Mr. Constantine to leave the neighborhood. That's not what this is about.

This case is about: if a racetrack use and the use of helicopters landing and taking off are considered to be accessory uses to a single-family residence. The case is about an interpretation of the language of the Zoning Ordinance. An interpretation does not just affect one piece of property. Unlike a zoning case or use permit, or a variance case, where it's about a single piece of property, and stipulations can be added to those particular case, subjecting the approval to those stipulations. An interpretation affects not only this property, all property in the City, not just this parcel because an interpretation is an interpretation of the language of the Ordinance.

An interpretation cannot take into account particulars like approach patterns, types of helicopters, types of mufflers, noise amelioration issues, as well as the size of the lot, whether it be 27 or 40 acres or five acres. These items are site specific and are use specific, not subject to interpretation. This is the reason why helipads that are allowed in the I-1 Industrial district requires a conditional use permit so that the city can control these specifics. A very heavy district as well as a conditional use permit.

However, in an interpretation, once an interpretation is made that a racetrack and a helipad can be accessory use to a single-family residence, these uses can be used throughout Scottsdale in residential areas. For instance, if a helipad is allowable as an accessory use for one home, then it's possible to have several property owners; twenty property owners in a particular area decide that they want to use this as an accessory use as well. And it is an interpretation of the Ordinance they can do so.

The definition of accessory uses and requirements under the Ordinance was specified by staff, and I would like to go through them once again, because I think it's important. Accessory use shall mean a use customarily incidental, related, appropriate and clearly subordinate to the main use of the lot or building, which accessory use does not alter the principal use of the subject lot or building or adversely affect other properties in the district. Let's take a closer are look at what that definition means. Customarily incidental, Webster's New World dictionary says, defines customary as usual and habitual. And defines incidental as secondary or minor. Therefore an accessory use must be a use that is usual, that the use is secondary to the primary use. Usual,

common accessory uses to homes in Scottsdale include tennis courts, basketball courts, tool sheds, swimming pools, equestrian riding paths, batting cages, and things of that nature.

All these accessory uses generally are passive and low intensity, they are comparable, and they compliment the primary use of the residential home. They are used, and this one is important, by family and friends as an accessory use. Ms. Lagarde argues that accessory use does not have to be usual, that it can be unique and still be an accessory use. And she shows pictures of unique accessory uses, supposedly in Scottsdale, the miniature train track, the baseball diamond, equestrian use area, and helipad at a home. Just because a use is built in conjunction with a residence doesn't mean it is an accessory or allowable use. For instance, the home with the existing helipad. Just because it's there, the helipad could have been built without the City's knowledge, or it could have been built before it was annexed to the City. If so it could be either a violation or it could be a grandfathered use.

Violations should not be used to justify further violations. Just because someone is landing a helicopter somewhere else doesn't make this a legitimate accessory use. And that 1983 case is important, because it shows the tone and the intent of our legislative body. It's important to note that in 1983, the Scottsdale City Council specifically considered the Planning Commission recommendation to allow heliports in an R-190 zoning, in residential zoning, subject to a use permit. We're not even talking about a use permit here. We're just saying, "Hey, you can do it". City Council unanimously denied the request, and stated there is no place for heliports here in residential areas.

All of the uses that Ms. Lagarde shows as unique accessory uses except the helipad and maybe the train, although it goes very slow, but encompasses a lot of area, are passive recreational uses, a trout pond, equestrian trail, even the miniature train track. They're common, even unique ones, still compatible with residential areas. The baseball diamond is quite common in residential areas. They exist in parks and schools, and it's not unusual to have that in a residential area. No one could possibly conceive that a racetrack and helipad are passive recreational uses. They create conditions not normally conducted in residential areas.

Ms. Lagarde bases her unique arguments on that 1976 Paradise Valley Lindberg case, to refute that an accessory use must be usual. The Lindberg case involved whether or not an amateur radio operator could erect a radio tower on his residential lot. The court found that family hobbies, a family hobby, recreation and education are accessory uses and incidental to the single-family residence. As long as the activity is in the form of a family hobby, recreation, or education,

it is permissible, even though it's unusual. She states that Lindberg recognizes that uniqueness can be customary for a particular family.

Mr. Constantine's hobbies, racing and the helicopter takeoff and landing, although unique, would therefore be allowed according to Ms. Lagarde's interpretation based on the Lindberg case. I don't believe that's the case. Let's take a closer look at Mr. Constantine's family-oriented hobbies, and I am not going to go with allegations here, I'm going to talk to you a little bit about what has been reported and said and quoted by Mr. Constantine. Ms. Lagarde states that Mr. Constantine wants to have a home together with a paved recreational track for go-carts, bikes, and other children's play activities.

Indy Racing Online, 2000, quotes that Mr. Constantine's track is a hot spot for local drivers. In that same article, Mr. Constantine, a professional racetrack driver is quoted: "I think just about every racer in Arizona has been there. A lot of CART guys that live in Phoenix practice there. Arie Luyendyk is a regular. We do a lot of practicing." The Scottsdale Life magazine quotes that fellow racers such as two time Indy-winner, professional race car driver Arie Luyendyk, Brian Hurta, PJ Jones, Adrian Fernandez and Mark Clundell come to practice because they say it's one of the toughest pro-level private practice tracks in the world. Ancillary use?

Further, Mr. Constantine is quoted: "We fly out the management guys of our sponsors and let them mess around for the day." Incidentally, Mr. Constantine owns or owned a private aviation company that distributes helicopters to corporate executives and wealthy individuals. Children's play activities? Ms. Lagarde states that the track was used only sporadically during the time when the home was under construction. Again, Scottsdale Life states that Mr. Constantine stays in great shape by driving nearly everyday on his track. Ms. Lagarde also states "a special engine muffler and other sound containment installations were made to the 125 cc shifter carts to minimize noise impact. Scottsdale Life article quotes Mr. Constantine: "We used some other souped up carts for our sponsor days. Mr. Constantine states that they use a 125 cc cart. The International Kart Foundation states that a 125 cc shifter cart can go 95 miles an hour, not like the demonstration that was given out at his particular site. It can go zero to 60 in less than six seconds and are for senior drivers, not for children.

From Mr. Constantine's quotes, it is quite obvious that the race track is not primarily used for recreational purposes associated with a single family home, for his family, but is a professional level racetrack, used by professional drivers to keep in shape, and practice for professional races and to entertain business associates. The demonstration on September 27th was in fact

orchestrated to be about noise outside of the Constantine property, not about observing the nature and extent of the racetrack and helipad uses on the property.

You were not allowed to enter on the property. You were not allowed to witness, up close, the nature and extent of these uses. This demonstration was about noise. This case is not about noise. It's about the full extent and nature of these uses. Another court case that Ms. Lagarde glosses over, as not being relevant, is the Redington Ranch case. We believe this case is relevant. This case addressed if Mr. Redman, the owner of the property could land his helicopter at his residential home. This isn't about a tower for a ham radio operator. It's was the same situation as ours, dealing with a helicopter landing pad on a residentially zoned lot with the same exact language as the language in your Zoning Ordinance, customarily incidental. The Redington case was heard in 1987, after the Lindberg case and the Redington case actually talked about the Lindberg ruling and said that the Lindberg ruling did not go far enough. The Redington case states that the problem with the Lindberg ruling is that many courts, perhaps influenced by the notion that it is no purpose of zoning to prohibit unusual, had treated "customarily" as involving commonness.

Redington further states that those courts, like Lindberg, have included that if the use is incidental that it's permissible. That, of course, leaves the term customarily out of the zoning provision, and your Zoning Ordinance, and that Zoning Ordinance did say customarily. The Redington case is not what Ms. Lagarde said it was. The Redington case actually set up some good parameters. What it said: "We believe it appropriate to define a customarily incidental use in terms of the purposes of zoning generally. The general purpose of zoning laws is to promote the general welfare by providing a means of strengthening the character of a particular area in terms of its use.

It went on to state that whether a new use that is incidental is permissible should turn on whether or not that use when generalized would have a deleterious impact on legitimate zoning objectives. It didn't turn on whether it was commercial use or not a commercial use; it turned on whether it would have an impact on the legitimate zoning objectives. The use of professional racetracks and taking off and landing of helicopters do not strengthen the character of a residential area. And remember, an interpretation must be generalized and it affects all residential zoning, not just one lot. And again, we could have 20 lots within a particular area deciding to do this kind of thing.

Lastly, the Ordinance clearly states that if a use is considered an accessory use it cannot adversely affect other properties in the district. The Redington ruling outlines the tests for this issue. The uses proposed, racetrack and helipad do not strengthen the character of a particular

area in terms of its use and would have a deleterious impact on the legitimate zoning objectives. In 1983, City Council decided that a helipad was not acceptable in residential zoning areas. A racetrack for motorized vehicles and a helipad does have a deleterious impact. The large lot residential areas of Scottsdale are known as quiet pristine desert neighborhoods, many of which have an equestrian lifestyle.

A racetrack use and a helipad use do not further the character of that area and those neighborhoods, and it does create unsafe conditions for equestrian uses. This is not just conjecture. Lynne mentioned it, there have been two people already injured on horseback, caused by helicopter taking off and landing. In conclusion, the decision before the Board is to decide if a racetrack and a helipad are accessory uses for a residential home in Scottsdale. The Board must take into consideration that the decision affects not only the Constantine property but all residential neighborhoods in Scottsdale. And the Board must also remember that it is an interpretation of the Zoning Ordinance, and specifics such as noise amelioration and flight paths are site specific and will be the subject of a use permit or a zoning.

It is important to remember that accessory uses allowed today for residential lots are low intensity, passive, common to residential for the most part, and comparable and complimentary to the residential zoning, promoting and preserving, I'll say it again, the character of residential development. That's what the court says. For all of this verbosity on both sides of the aisle here, and the definitions and the arguments, I think we all need to step back and just use some common sense here. How can anyone actually believe that a helipad and racetrack used by professional racecar drivers are accessory uses to a residence?

How would your neighborhood and your neighborhood's character change if you had racetracks and helicopters landing pads next door? Common sense, that's the litmus test.

COMMISSIONER WALSH: Is there a difference, technically, between a helipad and heliport. I've heard you use those terms interchangeably.

MR. LAZARUS: We have not been able to find a difference in our research between a heliport and a helipad. Heliport connotes, possibly a higher degree of use, but there's no specific definition that we have found. There's no limitation in whether you call it a heliport or helipad, in this instance. There's no limitation on the number of landings or taking offs.

COMMISSIONER WALSH: The 1983 case where Jim Bruner was quoted, was that for a heliport and commercial use within a residential neighborhood, as you understand it?

MR. LAZARUS: The way I understand it, it was a... they did not want to change the zoning to anything other than R-190. That is a residential area and I don't know whether or not they were even considering that as a primary use residential area. They did require, unlike this case, a conditional use permit as opposed to just saying, OK, you can do it.

COMMISSIONER WALSH: So would that be more of a commercial orientation within a residential zoning issue? Are you specifically aware?

MR. LAZARUS: I don't know. All I know is they were asking for a conditional use permit for that particular zoning.

COMMISSIONER WALSH: Again I'm following a helicopter line of thought. You talked about in an industrial use district, a conditional use permit was required, and I wonder if that is because the use is a pure business use in a more densely populated and high-end area and that's why the conditional use permit would be a requirement versus – and I know it's unusual - but an occasional residential use by an owner.

MR. LAZARUS: Well again, the Ordinance does not specify the number of landings and taking offs that can occur. The only time we find anything about helicopters landing and taking off, other than this argument about it being an accessory use, is in the industrial district and hospitals, where you have to go for a permit as well. Now, the purpose of that may very well be because it is a commercial use, but I don't know how you distinguish whether a guy is being paid or not being paid. The question is how many times are they landing, what are they doing to the neighborhood, does it affect the character of the neighborhood. Those are the kinds of things we need to look at when we start talking about whether or not this is an accessory use to a residential area.

COMMISSIONER WALSH: Just for the record, I hope I'd hear comments from maybe City legal staff on this line of questioning, and from Ms. Lagarde as she understands the facts.

CHAIR VAIL: Very good. We will address that on rebuttal. Does anyone have a question for Mr. Lazarus?

COMMISSIONER WALDMAN: Do you have any kind of proof or any kind of documentation as to how often this track is used?

MR. LAZARUS: We haven't been out there everyday to find out. You will hear people testify I'm sure that will be coming up who will discuss that. We are going by quotes from Mr. Constantine that occurred by various newspaper articles, web sites, by all of these things, and so it's obvious what's going on in this particular area. The other neighbors are here and probably will testify, I'm sure will testify, as to their particular experience.

COMMISSIONER WALDMAN: Have you talked to the Scottsdale Life people personally and was it kind of hearsay or just stuff they were writing to make it sound like a high lifestyle?

MR. LAZARUS: Do you want me to testify to the veracity of a newspaper?

COMMISSIONER WALDMAN: No. I just wanted to know if you spoke to them personally.

MR. LAZARUS: No. I did not speak to them personally, but there has never been a denial that these people are coming in and that this racetrack has been used in the past. And again it's not, as was the case in Paradise Valley, for the kids and for the personal use of a family. This far exceeds that.

CHAIR VAIL: Are there any further questions of Mr. Lazarus. If not I will give the City the first opportunity for rebuttal if you have any.

MS. BOOMSMA: The City doesn't have any rebuttal at this time. We might reserve it for the end of the hearing.

CHAIR VAIL: Very good. Ms. Lagarde, did you want to speak now before we have the public comment?

MS. LAGARDE: No Mr. Chairman, I understood that rebuttal would be after public comment. That's typically what it is. What I was just trying to get your attention for is, precisely to the point that was just raised. Arie Luyendyk is here. He's a professional driver. He can tell you how many times he has been on the track and what has happened. He has a commitment, and has to leave and I was just going to ask if you could let him speak first because of that time commitment. I think this is very factually relevant.

(Chair Vail opens the Public Comment section.)

CHAIR VAIL: I will honor your request and would ask if there's anyone else who needs to leave for any other reason, I will give you preferential treatment.

ARIE LUYENDYK: Good evening. My name is Arie Luyendyk, I live at 12494 North 116th Street in Scottsdale. And I've known Tommy for many years, but it's been exactly twice that I have been at his track, and like I think you mentioned, to maybe glamorize the lifestyle. I think that's exactly what happened. The quotes that were put on the screen, they were never said by me. And what I hear all evening is the talk about a racetrack. This is not a racetrack. Indianapolis is a racetrack, Phoenix PIR, Firebird, those are racetracks. This is just a little recreational go-cart track where Tommy has invited myself, Fernandez, PJ Jones, Mark Lundell all there.

Very sporadically do we go there. In the past four years, I have been there twice. And drove a 125-shifter cart--that's correct. But the cart has a special muffler on it, and the cart is very quiet. I think it's irrelevant how fast these carts can go. It's more relevant how much noise they make. Once in 2000 and in 2001, the only times I went to this track, I took my twin boys there, and they drove the little kiddy carts. It's not a racetrack. I want to really stress that. It's a go-cart track. It's recreational. It's like getting a bunch of friends to go and slide off my pool slide. That's the way that I look at this property of Mr. Constantine. That's all I have to say. Thank you.

(The following public testimony is not presented verbatim.)

Michael Bradley, 8300 East Dixileta, spoke in opposition to the to the racetrack and helipad on behalf of the Siquidados Board of Directors and majority of residents of that community. He stated that resolution of the problem now, would prevent many problems in the future.

Mr. McCarthy, 30600 North Pima Road spoke in opposition. He referred to the desirability of the quiet tranquil neighborhood of Siquidados and surrounding areas, and stated that that tranquility would be in jeopardy should the racetrack and helipad use be allowed. He also noted that property values would be damaged.

Mr. Doug Newton, 30600 North Pima. He spoke in opposition and stated that he, referring to the previous discussion on accessory uses, did not “customarily or incidentally” expect his neighbors to have a helipad or a racetrack. He characterized the noise demonstration on September 27th as irrelevant and a minimum test only of the potential noise.

Mr. Aleo, 28625 North 85th Street, spoke in opposition to the accessory uses. He read into the record a letter from Mr. Lazarus to Ms. Villalpando, Assistant City Attorney, dated October 3, 2003.

Mr. Huebner, 30600 North Pima Road, noted his proximity to the subject property, and stated that he is retired and home on most occasions. He assured the Board that he has never been disturbed by any of the activities on Mr. Constantine’s property.

Mr. Zuckerman, 8505 North Mira Vista, spoke in opposition, observing that equestrian use of the Rawhide Wash had been suspended due to a wall built around Mr. Constantine’s property. He also referred to safety issues relating to equestrian use and helicopter use.

Ms. Dean, 8686 East Morning Vista, spoke in opposition. She read from her medical report, relating to injuries resulting from being thrown from a horse. She explained that the injury was a result of her horse being frightened by the helicopter noise from Mr. Constantine’s helicopter. She expressed her hope that the Board would do the right thing.

Tony Nelssen, 7736 East Redbird Road. He spoke in opposition and addressed the issue of public safety. He stressed the negative impact on the portion of the public trails system in the subject area. He referred to loss of the Rawhide Wash by equestrian users, and pointed out the noise created by helicopters and go-carts in an area used by bicycle a variety of recreational users. He showed several photographs to the Board demonstrating his concerns.

Mr. Howard Myers, 6631 East Cornell Trail, spoke to impact on adjacent properties. He noted that the area is designated as an equestrian use area, not compatible with the uses on the Constantine property. He advocated employing a use permit as the solution to this dilemma.

Ms. Sharon Huebner, 30600 North Pima Road. She noted that her home was directly north of the Constantine property. She noted her apprehension when first learning of the possibility

of a racetrack on the Constantine property, but went on to state that since its construction, there has been minimal to no disruption from the racetrack. She referred to disruption caused by traffic on Pima and Dixileta Roads as being much more of a problem.

Mr. Don Dorchester, Jr., 30598 North 75th Street, spoke on behalf of the general property interests in the area. He related extensive experience in the real estate business. He provided his opinion that the issue was not about property value damage, but unhappy and misdirected neighbors. He refuted the representations made that property values had been affected and that to his knowledge, no disclosures had been made on those properties on the market.

Mr. James Heitel, 8485 East Dixileta, stated that he was the party who had requested the interpretation. He reported that Mr. Critch, a neighbor who currently had his property for sale, had stated that he was disclosing the existence of the racetrack and helicopter pad. He clarified that the 1998 building permit site plan showed a proposed drainage easement area and recorded NAOS in the flood plain. The 404 permit for the wall was issued solely for box culverts, and did not address the racetrack. When the racetrack was built afterwards, the racetrack was channelized. He stated that the issue is land issue, not a nuisance issue and that accessory uses are not permissible under the code.

Mr. Carl Johnson, 7826 East Las Predras, spoke to the issue relative to noise and protection of the future of the area and requested that the Board deny the request of the applicant.

Mr. Nerguizian, PO Box 27170, observed that many helicopters fly frequently over the subject area, creating noise unrelated to Mr. Constantine's use of a helicopter. He also noted that no permit is required for use of the go-cart track, and suggested that the issue here was primarily one of equestrian use versus those who leaned towards other recreational activities. He also spoke to the importance of upholding the principle of private property rights

Alan Kaufmann, 8711 East Pinnacle Peak Road, addressed, representing the Coalition of Pinnacle Peak. He reviewed the permitted accessory uses in the R-190 uses, stated that the helipad and racetrack were not customarily incidental uses, and that the interpretation should not be upheld. He urged the Board to interpret the Zoning Ordinance to exclude racetracks and helipads from residential districts.

Mr. Richie Carbajal, 3553 North Goldwater Blvd. expressed concern that the City could issue a permit based on a interpretation of an Ordinance and then not only question the interpretation of that Ordinance, but whether the Board has jurisdiction over the issue. He referred

to the importance of diversity and for people to be able to enjoy the uses available to him on his property.

Mr. Steve Loy, stated his concern regarding the effect of the helipad and racetrack on property values in the area currently and in the future. He requested that the Board consider the right thing to do.

Daryl Williams, 340 East Pal Lane, stated that he was counsel for Mr. Constantine, and had submitted a comment card in the event there were questions or rebuttal.

Mr. Thomas Masano, 116 Siquidados, characterized the go-cart noises as negligible, and noted that the track is not visible from outside of the property. He observed that motorcycle riders, creating noise, travel Pima Road routinely. He referred to Mr. Constantine's property as an asset to the neighborhood and supported continued use of Mr. Constantine's activities.

Stacey Mayes, 11448 East Bluesky Drive, addressed her concern about the right of the property owner to the free use of his property. She stated that she planned to introduce her four-year old twins to carting, and that it is an appropriate children's activity. She also referred to the safety issue as it related to horses and helicopter noise, and noted that anything can spook a horse.

Mr. John Meyer, 14605 North Airport Drive, spoke to the issue from a business perspective. He referred to the development of the Avalon Air Center by Mr. Constantine, and the potential impact of the interpretation on the construction and the building industry in the City of Scottsdale.

Craig Stull, 10500 East Lost Canyon, spoke to the issue of horses versus helicopters, both of which he owns. He commented on the use of the Notar helicopter used by Mr. Constantine and the fact that, at 500 feet, the Notar has the same noise signature as city traffic. He also noted the jurisdiction of the FAA as soon as the aircraft leaves the ground. He also commented that flight paths from Scottsdale Airport lead directly up the Rawhide wash, and stated that helicopter pilots fly over washes so as not to cause problems for resident nearby.

Bob Vairo, 10040 East Happy Valley Road, spoke as President of the Coalition of Pinnacle Peak, and stated that the City has erred in its interpretation that a go-cart track and helipad constitute accessory use. He described the issue as one of land use in a residential zone. He urged the use of common sense in interpreting the Ordinance.

Mr. Leon Spiro, 7814 East Oberlin Way, spoke in opposition to the issue, and requested that the Board not approve either use due to their adverse effect on residentially zoned properties. He also referred to the grading of the 100-year floodway plain by the applicant, and suggested an investigation of such as a matter of safety for those downstream.

Ms. Julie Brown, 16050 North 35th Street, stated that she had taken her horses to the noise demonstration at the Constantine property and that it was a non-issue. She refuted claims that helicopter noise was a relevant safety issue for equestrian use.

Mr. Tim Gendreau, applauded the diversity of uses in the subject area. He noted that the real annoyance is the normal traffic on Pima Road. He also referred to the air traffic noise.

Mr. Charles Cottrell, 12650 North 103rd Place, spoke as a business owner. He noted that the City had granted permission for Mr. Constantine to build on his property, and that it now was asking to take it away. He asked if that was something that would be done when relative to his business construction as well. He noted the existence of an allowed helicopter landing at a residence near his home, referred to go-peds and equestrian use in a residential area as legal uses. He stated that Mr. Constantine has a legal right to use his property.

(Chair closed public testimony. The minutes resume verbatim transcription.)

CHAIR VAIL: Mr. Nelssen was the professional photographer who displayed a photo of a helicopter landing, a horse, the car driving by and the young man on a bicycle, so on. That picture was a composite. Mr. Nelssen - I admire the fact that he took the time – his three minutes ran out. It wasn't that he was not going to say it. He did want me to make it clear that that was a composite to illustrate the potential hazards associated with the accessory uses of the building. Thank you, Mr. Nelssen. I have several cards from people who did not wish to speak. I will go through them quickly. Then take a five-minute break.

In support were:

In opposition were: Inge Varo, Marilyn Andrews, June Hess, Cathy Heitel, Michael Marlone, Allan Bone, Janis Ellis, Donald Andrews, Judith Wagman, Lloyd Doerr, Elizabeth Masters, Donald Patzem, Linda Fernault, Don Marsutrat, Eric Hess

(A recess was taken from 9:25 PM to 9:42PM)

MS. BOOMSMA: Chairman Vail and Board Members, the only comment that we would like to make is that although everyone has discussed this in terms of the go-cart and racetrack use and helicopter use as if they are the same, they are distinguishable and it is possible that you could make different rulings on each of the accessory uses.

MS. LAGARDE: You have heard conflicting testimony, most of that based on personal experience by the closest neighbors, and again, I want to show you Mr. Critch's property. He is in this location; it's the large house closest to the property. He is in support. He said there's no problem. You heard that from the two closest neighbors across the street in Sinquedados. The staff report confirms that you had all of these opposition e-mails and you heard a lot of testimony tonight based on the fact that more people thought this was a proposed use. They didn't even know it was there. It was there, which I think, says a lot about impact, character, and compatibility.

A lot of what you heard was fear, based on future use. That is controlled by your Ordinance. If it becomes commercial, if it becomes the principal use, if it becomes adverse, it is a zoning code violation, to be enforced by fines, jail, citations etc. Again we would ask you to try to distinguish the factual testimony that you heard, based on lot of fears, allegations, and exaggerations. Mr. Luyendyk told you, his personal use of the track was twice, two years ago when it was first installed. He asks you to distinguish between the hype, the web sites and the articles quoted by Mr. Lazarus occurred in the year 2000.

When Tommy first moved here, when he was at the height of his racing career. It was exactly like Mr. Luyendyk said: hype on the life style, hype on the career. It was not what happens on this site, not what the neighbors closest to the site have told you happens. The use has been occasional and sporadic. It has not ever been commercial. It is simply a private use.

As a former English teacher, I just want to make one little comment about the term customarily incidental. Incidental is describing the use as secondary. The word customarily, modifies the word incidental. It means that usually these uses are secondary to the principal use of the house. It has nothing to do with whether they are usual or common. Your City and your Ordinance have allowed both common and not common uses. Again the fact about helicopter use in the area, you heard that pilot Mr. Stull tell you how he flies over this area. What he forgot to tell you is, his was the silver helicopter that flew over just in the normal course of his flight on the Saturday that some of you were there.

We also have a letter from the other helicopter pilot, that you did not see, but I saw, that came very close to Tommy's property: He flew, he said, this was Mr. Jones of Quantuum, he was flying on a normal tour coming from Bank One Ballpark going to Sedona, noticed the gathering of

people, swooped down to see what it about. Helicopters do that sort of thing. You've heard from Mr. Stull, the FAA regulates the height at which they fly. Helicopters are easily mistaken for one another. We feel very bad if Ms. Dean's injuries were caused by a helicopter. But, there's no proof they were caused by Tommy's helicopters. I was there the day the helicopter landed and an alleged "thrown or almost thrown" happened. Everyone there...we all sort of rolled our eyes. You saw the impact of that helicopter landing and it did not spook the horses.

With regard to a use permit, I think we have to be very clear about that. A conditional use permit is issued to allow a principal use of a property, subject to a use permit, which controls the impacts on another. And Ms. Walsh specifically asked about this question in the R-1 district. It is a principal use, it is a commercial use, and it is a heliport use, regularly scheduled. It is not an accessory use. Use permits have nothing to do with accessory uses. Those cannot occur on the property without a main use. The I-1 district allows them as a principal use, and controls them with a use permit criteria.

With regard to common sense, common sense would tell us that probably ostrich farms and riding miniature trains don't occur on residential properties either. Any impacts that are adverse are controlled by the Zoning Ordinance. You were there; we all heard it. This is a go-cart track. It's for go-carts. It is not for racing cars; it is not a racetrack. It is Mr. Constantine's hobby, his recreational pursuit. At this point not a professional racecar driver maybe would like to be in the future. But again, do not be swayed by exaggerations about what this go-cart track actually is. It is a hobby, a recreational use just like many others that are approved in Scottsdale, and because the use is so well buffered, adjacent, it's not incompatible with what's going on out there.

We are asking you again to focus on the law and not set the wrong precedent. Ms. Mayes, whom I have never heard, raised the very issue that I raise to you. If you set a precedent that you can overturn the Zoning Administrator, who has said: "This is an allowed accessory use, and the way to control impacts is by a nuisance suit or a code enforcement." If you overturn that, every use on every property in the city of Scottsdale could be subject to the same kind of conflicting testimony debate in front of you in which you will be asked to determine, horses versus helicopters, life style choices, which are appropriate.

We should celebrate the diversity, as someone said, rather than restricting the use of property because some neighbors have complained. We are therefore asking you to uphold the interpretation of the Zoning Administrator, based on the law, supported by the law and not overturn that decision in a determination that opens up every accessory use as being a potentially not

allowed use because people complain about it. That's not what your Ordinance was intended to do. Thank you.

COMMISSIONER WALDMAN: We have heard slightly of possible plans for expansion of this track; whether it is racetrack, go-cart, whatever. Have you heard or do know to the best of your knowledge any plans for that or increased use of that track?

MS. LAGARDE: No, I do not. I never heard that until I came here tonight, that there was some allegation, again a claim that we were expanding the track or use of the track. There is no intent to use it for commercial purposes, for more intense uses, for festivals or celebrations; none of the things alluded too. This is Mr. Constantine's private track. He knows the law. Any of those uses would violate the code.

COMMISSIONER WALDMAN: One other thing, something that kind of bothered me. Since 1998 this house has been on again off again. While the track was built, but the house has been on again, off again, and it's almost like primary versus secondary, which is going to be used. Can you explain why that's occurred?

MS. LAGARDE: I can tell you what happened in 1998, which is when the wall went in and the first permit was issued. In the middle of that, once construction had started, Mr. Constantine changed builders and architects, and so at the time he went back in and renewed his permit. In 1998 were told by the City, very specifically, as long as there was a building permit for the principal use, the use of the track could occur. The Zoning Administrator has since asked and said to us, that's not the case. If there wasn't a building permit, stop, and Tommy stopped. And the reason why construction on the house stopped in about 2001 is the same reason why construction on a lot of things stopped and that is financial reasons. There were some disputes over a water line installation, and at that time the track was not being used. What is a little bit perplexing to me is: why all of a sudden, five years later, just when Tommy is building his house and hasn't used the track, and the helicopter pilot has told you he hasn't landed, why all these complaints. And that's why we have said to you that those are just allegations, and there's something else going on, besides the use of the track.

COMMISSIONER WALDMAN: You're saying the track hasn't been used in four years?

MS. LAGARDE: No. It was used initially when we had a building permit. When we did not have the building permit, Mr. Constantine tells me, not necessarily by choice, but he tells me he was not using the track. In March, the gentlemen who bought the other property used the carts with his kids twice. Tommy didn't know about it. As soon as we were told that use occurred, we informed him that the use had to stop. Again, the primary use of that house, I mean property, the everyday use is the home. The go-cart track is incidental, and has been used rarely and not during the time he didn't have a building permit, except for the one use that I am aware of.

COMMISSIONER WALSH: Just on the use issue. At this juncture, the Zoning Administrator has advised Mr. Constantine not to use track or the helicopter. So if I remember my literature correctly, Mr. Constantine didn't use the track except for once or twice and that's been the sole use, or was that only applying to the helicopter. What I'm trying to ask is: what has been the use of the track and the helicopter since the first of the year?

MS. LAGARDE: The first of this year? The helicopter hasn't been used at all, and it probably goes back farther than that, but we didn't ask the pilot to go back into his logs. The go-cart track, to our knowledge, was used, I think, twice by the gentlemen who bought the property with his children. When we were informed, we told them not to use it. So these uses have not been occurring. We understand they are secondary to the primary use. The Zoning Administrator had a change of heart and said, "Don't use it even if you have a building permit," and we are not going to do that.

COMMISSIONER WALSH: And you are prepared not to do that until there is a Certificate Of Occupancy on the house?

MS. LAGARDE: Yes. We have acknowledged that we would not.

MR. LAZARUS: When there's nothing left to be said, somebody is bound to stand up and say something else. A couple of speakers came up and said that Mr. Constantine had a permit and we are now taking away that permit. So he had something, and we are now taking that away. That's not true. There was no permit issued for any of these uses that we are concerned about in relationship to the interpretation. I think that needs to be clear and, that's just wrong. I need to go

back to the Redington case, because I think that is really the key here. We are talking about a lot of Illusions.

A lot of people are talking about things, about what's occurring, what's not occurring, when's it occurring, what's the historical nature of the property. Let me go back to the Redington case again, where it says, what is customarily incidental in terms, and they use the terms that you define customarily incidental use in terms of the purposes of the zoning generally. What is R-190? What is the purpose of that particular zoning category? It also states that the general purpose of zoning laws is to promote the general welfare by providing a means of strengthening the character of a particular area in terms of its use.

This area is subject to Foothills Overlay, ESLO, NAOS, all the things that try to preserve to preserve a certain type of lifestyle. Helicopters. What type of lifestyle are we talking about? What is the character of this particular area? You can't control how many cars are going to go down that street, but what you can control is the type of ancillary uses that might occur. These helicopters are not just flying over. These helicopters are landing and taking off. Again, we need to go back to what this is all about. This is an interpretation. It's not a zoning case. If you interpret this is an accessory use to an R-190 residential zoning, there are no supplemental controls.

You can't stipulate that it will be a certain type of helicopter, that it will be a certain size lot, that the use will be specific, what the number of landings are. When you start talking in terms of principal use versus ancillary use or a use that is not a principal use. I don't know what that means. How many times can he land and take off. Today, maybe his intent is not to take off and land a lot of times. Maybe he sells the property, and the next owner wants to take off and land a lot of times. There's no way of determining that. You are making an interpretation of a Zoning Ordinance. You are not controlling this property alone. And, in fact, that can change without a zoning violation.

There's no zoning violation once you determine that this is an ancillary use to how many times a party can take off and land. It still allows generally that kind of use. Lynn and Mr. Constantine may very well assure you that it's not their intent to do anything different, that they will land less times, that they will use quieter helicopters. We cannot control that when it comes to an interpretation. We can't control it on this property, and we certainly can't control it on other properties that would benefit from an interpretation that would allow this as an ancillary use. So I think historical use and even assumptions as to how it will be used in the future are illusionary. We are talking about an interpretation here. With that, if you have any questions, I would be happy to answer them.

CHAIR VAIL: The case will now go to the Board for discussion.

VICE CHAIR KUHSTOSS: This is not is an accessory use. This is a ploy. How can it be an accessory use if we have no primary use? The whole idea of it not being used when there was not even a house there and people living there, even if it's just Mr. Constantine and his family, of course would affect whatever use, extra uses would control. They're absolutely right, there is no control over this person if we allow that this as an accessory use, either one of them. We can't stop a hundred helicopters from going in and out there a day. We can't stop racecars being there because we have a track: I don't know if the same size car could fit on the track. I'm sorry to say this man has already violated the agreement on the trees. I was very concerned; it didn't seem to me to be a very good display when we were out there on the 27th. I did see all these trees that I knew under the ESLO and other acts were supposed to be taken care of. They weren't, they were dead trees. By allowing these to be accessory uses we are going to destroy that whole area that has become quite a showpiece for the city of Scottsdale as an equestrian area. And I just think that the Zoning Administrator just blew it this time.

COMMISSIONER SANDS: No comments.

COMMISSIONER PERICA: Many of the comments that we heard from the neighbors and anyone in the audience related to noise. I don't believe noise is the issue. There is noise there on Pima Road. There is noise on Shea, traffic noise and airplanes all around. Noise isn't the issue, and that's not what we are supposed to be discussing as a Board. I don't believe that the Zoning Ordinance did intend for the use of helipads or racecar tracks in residential areas. I feel that we must reject the Zoning Administrator's decision and deny the use.

COMMISSIONER WALDMAN: I'm of two minds. Number one, I'm a horse person, I've had horses for a long time. But number two; I love to drive go-carts too. In this situation, I think as far as the go-cart track and the noise issue, I can't conceive of there being much more noise on that track than along Pima Road. I've driven there many, many times and have spent a lot of time in the area. Mr. Constantine's work and profession, his whole life as a racecar driver, to have a hobby driving go-carts I can see as an accessory use. The gentlemen bought 40 acres so as not to annoy anybody close. As far as the helipad is concerned, I think that's totally out of bounds. It's

not an accessory use. I think that should be denied, but I think the racetrack could be an accessory use.

COMMISSIONER WALSH: We are quite diverse in our opinions here. I find that what would be unacceptable on a smaller lot or denser development, perhaps become accessible in open areas? I believe that one who can afford to build a home and own 28 acres has different tastes, toys and hobbies than the rest of us. As a public accountant in the past, I actually had the privilege and enjoyment of dealing with many people who raised horses for show and had extensive farms. I have been on extensive Arabian horse farms that were hobby uses allowed in the area. Yet I have lived in a dense area where the horse did plop down my street because I was close to the stables, so I'm rambling a little bit, but I am trying to express the one end of the spectrum to the other. I have been on private large home areas where in fact I was not a passenger in a personal helicopter but the individuals had helicopters.

This city, I think, is proud of its diversity and that we respond to all of our citizens, whatever economic advantages or different neighborhood styles that they have. So I am kind of reluctant to tell someone to try to zone a hobby or an interest. I'm very reluctant to do that. I do feel that that leaves us open to a great deal of future, what shall I call it, noise within the community. I'm very worried about that. So I would say to you that right now we have the fear of what might happen, with accelerated use in an area not being considerate of the community and the neighbors.

Certainly the neighbors have expressed themselves, and certainly, Mr. Constantine has to be well aware if this Board, and I may be in the minority, were to agree with the Zoning Administrator that he jolly well better be careful and considerate of his neighbors. But I do think that somebody with a hobby of a major horse operation needs to recognize that their neighbors can have other interests. It's not strictly an equestrian area. Hence I will vote to uphold the Zoning Administrator's decision just because I think that there needs to be more...the people need to live together and have it proven that it is an incompatible use and not considerate of the neighbors.

CHAIR VAIL: I agree with Commissioner Perica that noise is not an issue. I live at Pima and Dynamite, and everything from the leaf blowers on the golf course at six o'clock in the morning, to the dirt bikes, and go-carts. The visit to the site on September 27th, it was practically indiscernible. So like Commissioner Waldman, I am of two minds on this issue. I have always been very sensitive to the restriction of property rights. I find it very difficult to tell someone that

they were granted permission to build, clearly knowing what was going in, and telling them that, well we have changed our mind.

I also take issue with the people who were out there on that Saturday who complained to me that they couldn't go onto the property. Well the noise that you hear, you don't hear from being on the property, you hear from our homes, which surround the property and again that becomes a non-issue. It is a very, very difficult decision for me and I empathize with so many of the people in the audience tonight, but I just can't find a way to disagree with the Zoning Administrator's decision. I echo Commissioner Walsh's feeling on that. Any other comments or discussion before we make a motion.

COMMISSIONER WALSH: I would like to make one more comment on the helicopter issue. This morning, I enjoyed reading my newspaper with the doors open and two helicopters came right over the roof of house. And I'm not in a direct air path. And I think that the noise I heard, just very specifically in a casual residential area was far noisier than what the Notar helicopter did, and again there were other single engine planes that came up. And we do live in an area where we do have air flight activity. So I would like to say that I concur that I don't believe that noise is the issue.

VICE CHAIR KUHSTOSS: In light of the comments made, I think we should take a separate vote on the helicopter and racetrack.

MS. BOOMSMA: Chairman Vail and Board Members, that's correct. There really are two issues in the zoning administrator's letter that are analyzed in the same way but are potentially different, so if you wanted to make one motion as to the track and a separate motion as to the helicopter, that would be appropriate.

CHAIR VAIL: And that motion could be made upholding the Zoning Administrator's decision, for example, with the exception or exclusion of the helicopter.

MS. BOOMSMA: I would suggest that you take one motion that says: a motion to uphold the Zoning Administrator's decision as to the helicopter as an accessory use and then the second motion would be as to the track as accessory use.

VICE CHAIR KUHSTOSS: I move that we overrule the Zoning Administrator's interpretation as far as the helicopter situation goes.

COMMISSIONER PERICA: I will second.

CHAIR VAIL: It's been moved and seconded that we overturn the Zoning Administrator's decision, as it relates to the helipad.

THE MOTION CARRIED ON A FIVE (5) TO ONE (1) VOTE, WITH CHAIR VAIL, VICE CHAIR KUHSTOSS, COMMISSIONERS, WALDMAN, PERICA AND SANDS VOTING AFFIRMATIVELY, AND COMMISSIONER WALSH VOTING NAY.

CHAIR VAIL: I should probably clarify my stance on that, that I could support that motion by not having the helicopter. I really don't think that the carts are an issue, and I think by changing that motion we may have found a meeting ground that the Board could embrace.

VICE CHAIR KUHSTOSS: My second motion for the evening is to overturn the Zoning Administrator's interpretation of go-carting as accessory use in a residential neighborhood.

COMMISSIONER PERICA: I'll second that motion.

THE MOTION FAILED BY A VOTE OF THREE (3) TO THREE (3), WITH CHAIR VAIL, COMMISSIONERS WALSH AND WALDMAN VOTING NAY, AND VICE CHAIR KUHSTOSS, AND COMMISSIONERS SANDS AND PERICA VOTING AYE.

CHAIR VAIL: So the motion that was passed was overruling the Zoning Administrator's decision concerning the helipad to be a secondary use. Is there any further discussion from the Board? If not, I would entertain a motion to adjourn.

MS. BOOMSMA: Chairman Vail. We had one more issue as to the procedures. If the Board cares to review them over the next month, we can have a more extended discussion, but at least the issue has been raised.

ADMINISTRATIVE ITEMS

3. Consider amendments to the Board's Rules of Procedure

VICE CHAIR KUHSTOSS: I move that we spend the next month reviewing them and come back and discuss it next month.

CHAIR VAIL: I think that's the consensus of the Board I would like to thank everybody tonight for their cooperation. I know some will not be totally happy with the decision, but we do our best. Thank you

(The meeting adjourned at 10:10 P.M.)

Respectfully submitted:

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